No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CARNEGIE NATIONAL BANK, successor to The Hanchett Bond Company, a corporation,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, PAYNE AVENUE STATE BANK of St. Paul, Minnesota, a corporation, HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased, FULTON COUNTY BANK of McConnelsburg, Pa., a corporation, and DR. LOUIS D. HYDE,

Appellees,

and

HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased,

Appellant,

vs.

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Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

PETITION FOR REHEARING

Frank M. Catlin,
Wolf Point, Montana,
H. C. Hall,
Edw. C. Alexander,
Great Falls, Montana,
Counsel for Appellee.

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PETITION FOR REHEARING

1. *Rule 48-3 of the District Court has the force of law and must be complied with.*

The court holds that rule 48-3 of the District Court is not in conflict with rule 41 (b) of the Federal Rules of Civil Procedure.

In such case it "has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which came within it, unless it is repealed by the authority which made it."

Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U. S. 603, 43 L. Ed. 1103;

Weil v. Neary, 278 U. S. 160, 73 L. Ed. 243;

Nealon v. Davis, 18 Fed. (2d) 175;

In re G. W. Giannini, Inc., 90 Fed. (2d) 445;

State ex rel Nissler v. Donlan, 32 Mont. 256, 80 Pac. 244.

Rule 48-3 provides:

"Every cause, whether criminal, at law, or in equity, in which no forward step is taken for one year . . . . may be dismissed for want of prosecution unless good cause to the contrary be shown."

The above rule applies to dismissals upon the court's own motion. Dismissals for want of prosecution on motion of a party are covered by Rule 77. (See appendix.)

No cause, good or otherwise, was shown by appellants here. The court characterizes the delay as a "period of

indifference," and states that "appellants were at fault in failing or neglecting to conclude the matter."

Appellant's brief concedes (p. 13), "that the attorneys were gravely at fault in failing to bring the matter before the court for final disposition."

Under such circumstances it became the duty of the court to enforce its rule, for the situation clearly came within its terms. Whether appellee acquiesced in the delay is of no consequence. Appellee did not make a motion to dismiss or procure the order to show cause. The order was addressed as much to appellee as to appellant. Under such circumstances, no question arises whether appellee has been injured by the delay. The sole question is whether the court was empowered under a statute or its rule to enter the order of dismissal.

State ex rel Stiefel v. Dist. Ct., 37 Mont. 298, 304, 96 Pac. 337;

Pueblo de Taos v. Archuleta, 64 Fed. (2d) 807.

The court suggests in its decision that proposed findings of fact and conclusions of law and form of decree were twice presented to counsel for appellee, City of Wolf Point, which the latter declined to accept. But the last of these were presented in 1934 (R. p. 147), approximately five (5) years before the order of dismissal.

The decision further states that "appellees have not been injured by the delay in entering a decree; the City at no time made an effort to pay *its* indebtedness or even collect the assessments and it was in no worse position at the end than at the beginning of the period of indifference." (Decision, p. 7.)

The rule (48-3) does not require that the appellee show injury, and such a requirement should not be read into the rule.

The indebtedness is *not* an indebtedness of the City (save as to diverted funds), but solely of the special improvement district.

> State ex rel Griffith v. Shelby, 107 Mont. 571, 87 Pac. (2d) 183, 195.

There is nothing in the record before this court to show the City has not collected all assessments which were collectible prior to tax deed to the county. After that the assessments upon such property were uncollectible.

> State ex rel Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638;
>
> Stanley v. Jeffries, 86 Mont. 114, 284 Pac. 134.

Further, appellants seek by the decree lodged with the clerk to recover 6% interest on diverted funds. Thus, upon the sum of $6,200.00 claimed to have been diverted (R. pp. 116, 117), appellants propose to collect $2,200.00 interest. During this period there has been no decree from which the City could appeal to the Circuit Court. The statute of limitations has been suspended indefinitely. Such a situation should appeal to the discretion of any court.

> State ex rel Stiefel v. Dist. Court, 37 Mont. 304, 96 Pac. 337.

2. Action of Judge Baldwin.

In its decision the court says:

(a) "No reason is to be found in the record why Judge Baldwin entered the order to show cause in a case with which he was obviously unfamiliar."

(b) "The order appealed from renders ineffectual the decision of a judge of equal rank, to whom the cause was originally submitted, by another judge who *injected himself into the case on his own initiative.*"

As pointed out in the original brief of appellee, no objection was made by appellant to the hearing of the order to show cause by Judge Baldwin at Havre. Had there been such an objection, doubtless the reasons for the transfer of the case to Havre and for the presence of Judge Baldwin there would have been made to appear, if that was necessary.

There is always a presumption of regularity with reference to the proceedings of a judicial tribunal.

22 C. J. 128, sec. 68.

The only local defendant was the City of Wolf Point, some 125 miles nearer Havre than Great Falls. When terms of court were authorized at Havre, the cause was transferred to that point automatically. (U. S. C. A. Title 28, sec. 172 as amended; District Court rule 9-2, 3.) By agreement of the District Judges of Montana, Judge Bourquin, or his successor, Judge Baldwin, have, since 1932, assumed jurisdiction over all cases assigned to Havre. (Title 28, U. S. C. A., sec. 27.) The record does not show these facts because there is no record of it. But, under the circumstances, it seems rather harsh to state unequivocally that Judge Baldwin "injected himself into the case on his own initiative." He entered the order to show cause and the order of dismissal because, under the rule of the court and the statute, the case was on his Havre calendar for disposition.

Judge Baldwin found that no step had been taken in the cause since 1933. Under rule 48-3 it was subject to dismissal without order to show cause and without notice.

Nealon v. Davis, 18 Fed. (2d) 175:
Cage v. Cage, 74 Fed. (2d) 377;
Dillon v. United States, (9th Cir.) 29 Fed. (2d) 246.

However, he issued an order to show cause directed to all parties. At the time for hearing the order, no objection was made to Judge Baldwin proceeding in the matter.

Appellants contented themselves with the filing of an answer (R. pp. 92-95), which was submitted to Judge Baldwin (R. pp. 95-97), all without objection to his acting in the matter.

The answer obviously failed to show cause why no step had been taken in the action for six years. This is conceded by appellants.

Where no objection is made, and the appellant was willing to submit its case to Judge Baldwin, it may not now complain of an adverse decision by him. The right to hear the order to show cause conceded the right to decide, and appellants may not concede the one without the other, and merely object after the adverse decision.

There is here no question of the jurisdiction of Judge Baldwin. The question is whether he had authority to hear and determine. In such case, where no objection is made in the lower court with respect to such authority, the matter may not be raised for the first time on appeal.

4 C. J. S. pp. 509-511.

Here, as shown by the record, appellants were perfectly willing to submit the question of dismissal to Judge Baldwin. They were not willing that he decide against them. It is elementary that a litigant may not sit by without objection and speculate on the result of certain proceedings, and when that result is unfavorable, for the first time object.

Hanley v. Great Northern R. Co., 66 Mont. 267, 213 Pac. 235.

In the case of Ex parte Kamiyama, 44 Fed. (2d) 503, this court said:

> "It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court (citing cases), and, where a party has an opportunity to make an objection to a ruling adverse to him and does not do so, he cannot urge the objection on appeal."

Upon the question of a dismissal under rule 48-3, Judge Baldwin did not consider the merits of the case. The merits were not before him. He merely considered the applicability of rule 48-3, which had the effect of a statute, and the provisions of which could not be dispensed with "simply to meet what is supposed to be the exigencies of a particular case."

Nealon v. Davies, 18 Fed. (2d) 175.

While the net result of the dismissal is to render ineffectual the decision of Judge Pray on the merits, nevertheless the dismissal had nothing to do with the merits, and did not pretend to review, set aside, or disregard such decision.

Hardy v. North Butte M. Co., 22 Fed. (2d) 62.

3. Dismissal on the merits.

While appellee does not consider that a dismissal under rule 48-3 is with prejudice, nevertheless, appellee hereby consents that the order of dismissal be modified to state that the dismissal is without prejudice.

Cage v. Cage, 74 Fed. (2d) 377;

Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 612, 37 L. Ed. 577.

Respectfully submitted,

Frank M. Catlin,

H. C. Hall,

Edw. C. Alexander,

Attorneys for Appellee.

CERTIFICATE

United States of America,
District and State of Montana, } ss.
County of Cascade.

I, H. C. Hall, one of the attorneys for the above named appellee, do hereby certify that in my judgment the above and foregoing petition for rehearing is well founded, and such petition for rehearing is not interposed for delay.

H. C. Hall

.....

APPENDIX

Rule 9-2. Causes, civil and criminal, may be transferred by the Court or a Judge thereof from any sitting place designated herein to any other sitting place thus designated, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the Court or Judge thereof in either place.

CHARLES N. PRAY,
Judge.

Rule 9-3. All causes shall be assigned to that division of the District wherein they properly belong by conformity as near as may be to the laws of the State of Montana governing the place of trial in the courts thereof, and the trial of all issues shall be at the place where court is held within the division to which the cause is so assigned, unless by agreement of the parties with the consent of the Court or by order of the Court in its discretion or for good cause shown, such trial is ordered elsewhere. The plaintiff shall endorse on the complaint or bill the division wherein the cause is assignable.

Rule 77. *Dismissal for Want of Prosecution*—Dismissals for want of prosecution may be had as follows:

Sub. 1. Whenever the plaintiff in an action at law shall fail for one year from the filing of the complaint to have summons issued against any defendant who has not appeared in the action, or shall fail to make a bona fide effort to procure the service of summons within ninety days after its issuance, upon any defendant who has not appeared in the action, or whenever the summons shall not have been served and return made within three years from the commencement of the action upon any defendant who has not appeared therein, such defendant may on motion after notice, and special appearance for the purpose, have said action dismissed as to him.

Sub. 2. Whenever the complainant in a bill in equity shall fail to have a subpoena issued on such bill within one year after the filing of the bill, or shall fail to make a bona fide effort to procure a service of the subpoena, within ninety days after its issuance, upon any defendant who has not appeared in the cause, or whenever the subpoena shall not have been served within three years from the commencement of the suit, upon any defendant who has not appeared therein, such defendant may on motion after notice, and special appearance for the purpose, have said suit dismissed as to him.

Sub. 3. Whenever the plaintiff in an action at law or the complainant in a suit in equity shall neglect to bring the action on for trial or hearing for an unreasonable time after issue joined, and defendant may, on motion after notice, have the action or suit dismissed as to him; provided, that except in actions for partition, or to recover the possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this rule as to any defendant because of the failure to serve process on him during his absence from the district, or while he has secreted himself within the district to prevent the service of summons on him; and that no action or suit shall be dismissed for failure to bring the same on for trial or hearing, if such failure was caused by the defendant who makes the motion to dismiss.

Sub. 4. Whenever a cause shall remain unanswered on three consecutive calls of the General Trial Calendar, as provided in Rule 48, the same shall be dismissed for want of prosecution.